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In the
Supreme Court of the United States

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OCTOBER TERM, 1930

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No. 63

—o—

ABIE STATE BANK,

Appellant,

vs.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; WILLIS M. STEBBINS, AS TREASURER, ETC. ET AL.

—o—

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA

—o—

REPLY OF APPELLANTS AND ANSWER TO INTERVENER'S BRIEF

—o—

34,881

—o—

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The defense in this case rests upon the assumption that inasmuch as the state banks operated under the Guaranty Fund Law, they should be held responsible for the consequence of its failure. That law was not inspired by bankers, nor is it a bankers' law. A distinquished Nebraskan, who saw wrongs more clearly than

remedies, conceived the idea of protecting depositors in state banks by compelling them to pay to the state a tax to create a Guaranty Fund. In 1909 the State of Nebraska enacted a law whereby state banks were declared to be quasi public institutions under the supervision and control of the state, and that such banks should pay over to the state a certain sum based on average daily deposits, to create a Guaranty Fund, the purpose of which was to protect depositors in banks. This tax was to cease when the sum for such purpose in the Fund amounted to one and one-half times the average daily deposits, or approximately Three Million and a half Dollars. If the Fund was depleted, then the regular tax was to be resumed with an emergency tax as a relief measure to keep the amount of the Fund intact. Before the law was put into operation, the bank challenged the right of the state to enforce Guaranty Fund contributions, upon the ground that it was taking their property without due process of law.

This court held, in *Shallenberger vs. First State Bank of Holstein,* 219 U. S. 114, that in the exercise of its police power the state had the right to impose a tax to create a Guaranty Fund and to try out the experiment. Since that decision the bankers of this state have been loyal to the law. Some of them believed in it. It was only after the Guaranty Fund had utterly collapsed and when it afforded no protection whatever to their depositors that the banks withdrew their support of the tax and appealed to the court for protection. There was nothing else open to them. The tax must either be enjoined or most of the state banks would be forced into liquidation.

The following facts and statements are not in dispute or have been conclusively proven:

1. The Guaranty Fund is hopelessly insolvent. The deficit as of December 31, 1928, was $15,948,350.11, and the deficit has rapidly increased.

2. The emergency tax is confiscatory, and if continued will force a large majority of the present banks into liquidation. The tax imposed on banks for the Guaranty Fund has amounted to over $1,500,000.00, or 8% per annum upon their capital, for the past eight years. The emergency tax, designed as a relief measure, has become constant. The sums paid into the Guaranty Fund amounted to $16,709,842.11 as of December 31, 1928. As a result of such forced contributions the present banks are loaded with unproductive real estate not used in business of $9,872,647.21, and in addition $4,000,000.00 of doubtful notes which should be charged off, so that every penny of the bank's earnings and resources is necessary to relieve from this real estate burden and to clean the note cases. Two-thirds of the banks paid no dividends to stockholders in 1927 and 1928, and a large number of the banks will have impaired capital if this tax is enforced.

3. Under present conditions the tax takes from the going banks a large sum for the sole purpose of giving it to depositors in banks that have failed.

4. The purpose of the tax, to strengthen banks and to create a Guaranty Fund to protect their depositors, has failed. Instead of strengthening the going banks, it

weakens them. Instead of stabilizing the banking business, it disturbs it. Instead of protecting their depositors, it takes from them assets sorely needed for their protection. Instead of a police regulation for the public welfare, it is a forced contribution to pay the losses of failed banks.

5. The judgment of the Supreme Court of Nebraska in sustaining the tax rests solely upon the ground that such forced contribution does not constitute the taking of private property without due process of law. There was no other ground upon which the decision could rest if the judgment of the trial court was to be reversed.

6. The claims of estoppel or waiver are without merit, as there is no evidence to justify such claims.

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JURISDICTION OF THE COURT

Counsel for defendant urge that this court is without jurisdiction because of non-Federal grounds involved in the controversy. The judgment of the Supreme Court reads:

> "This cause coming on to be heard upon the appeal from the District Court of Lancaster County, was argued by counsel and submitted to the court; upon due consideration whereof the court finds error apparent in the record of the proceedings and judgment of said District Court, *in that,* contrary to the findings of that court, the levy of a special assessment upon state banks, pursuant to the provisions of Section 1828 Compiled Statutes of 1922, as amended by Section 26, Chapter 191, Laws of 1923, does not

constitute the taking of private property without due process of law."

It is clear, accordingly, that the Supreme Court of Nebraska rests its judgment solely upon the ground that the tax in question does not constitute the taking of private property without due process of law.

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HEAD NOTES OR SYLLABI

The head notes or syllabi are supposed to set forth abstract propositions of law which have received the sanction of the Supreme Court. The third paragraph of the syllabus reads:

> "Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the Bank Depositors' Guaranty Law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon deposits which have been levied for the benefit of the Depositors' Guaranty Fund."

It will be observed that the legal proposition is qualified as being applicable to a proper case. It is upon the above statement that defendants rest their claim that the Supreme Court of Nebraska considered and decided a non-Federal question. Certainly, doing business under a law, valid when enacted, does not estop a bank from questioning a police regulation as unconstitutional *when* it becomes unreasonable and confiscatory. To so hold would be to deprive the banks of the very protection which the Constitution affords, and if the State Supreme Court had so held, its decision would be subject to review by this court. Waiver or estoppel applies to acts

or conduct after constitutional rights arise, whereby one has estopped himself from claiming his constitutional rights. The right of banks to claim constitutional protection, arose when the Guaranty Fund became hopelessly insolvent, and the state was attempting thereafter to force contributions for the sole purpose of paying depositors in banks that had failed. It is not claimed that the banks have done anything or said anything since then which can be made the basis of estoppel or waiver. We submit, accordingly, that there is nothing in this record upon which waiver or estoppel can be predicated, and that the judgment of the Nebraska Supreme Court determines the ground upon which the case was decided.

In *Allen vs. St. Louis I. M. S. R. Co.*, 320 U. S. 553, this court said (p. 1031):

> "We deem it to be clear that the right of the complainants to contest the validity of the rates, if, as applied to changed conditions, they were found to be confiscatory, was not impaired by their action in putting them into effect."

In *Cooley on Constitutional Limitations* (7th Ed.) (p. 106), is the following:

> "Asquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the Constitution."

See also:

Swift & Courtney v. United States, 111 U. S. 22;

Gaar, Scott & Co. v. Shannon, 223 U. S. 468;

Robertson v. Frank Brothers, 232 U. S. 17;

Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280.

A MAJORITY OF THE BANKS WERE FORCED TO OPERATE UNDER THE GUARANTY FUND LAW OR SUFFER CONFISCATION OF THEIR PROPERTY.

Four hundred and ten of the state banks involved in this suit were engaged in the banking business at the time the law was enacted and had received their charters from the state. Such banks had no option, but must continue in the banking business or liquidate, and liquidation meant confiscation. When a bank ceases to do business, the amounts owing its depositors become immediately due. It takes time, and often a long time, to realize on its assets. To force its debtors to immediate payment results not only in a hardship on them, but often a very considerable loss to the collecting bank.

Mr. Van Peterson, who was Secretary of the Guaranty Fund Commission, and had large experience reaching over ten years in liquidating banks, stated that the loss averaged six times the bank's capital. We submit, accordingly, that a majority of the banks were forced to continue in the banking business under the Guaranty Fund tax or suffer liquidation, which would mean probably the loss of their capital, and in addition a liability

upon their stockholders. To hold the banks might nationalize if they did not wish to continue under the law, is equally fallacious. Many of the banks did not have the requisite capital to nationalize. The state banks, as a rule, serve the farming interests and the stock feeders near small villages or country towns, so that their location is not suitable for national banking. There is no escape from the conclusion, accordingly, that as to 410 of the banks in this controversy, they had to operate under the Guaranty Fund Law or suffer confiscation of their property.

The rule, however, is, as we contend. A quasi public corporation is not deprived of its constitutional protection by engaging in busines, or continuing in business, under a law which seeks to supervise its affairs, and when a police regulation therein *becomes* unreasonable, oppressive and confiscatory, and in violation of constitutional rights, such public institution has the right to claim protection of the Constitution, and to deny it such right under such conditions would be to deprive it of the protection which the Constitution affords.

THE LEVY OF THE TAX INVOLVED HEREIN UNDER PRESENT CONDITIONS VIOLATES THE FOURTEENTH AMENDMENT.

The deficit in the Guaranty Fund at the date of trial was approximately $16,000,000.00. The claims of depositors in failed banks were to be paid with interest in the order of their adjudication, so that a depositor in a failed bank whose claim was *first adjudicated* is entitled to pri-

ority of payment. It is apparent, accordingly, that no possible benefit could accrue to the bank paying, or its depositors, from the tax levied. *The levy of the tax is solely to take property from going banks to give to certain depositors in failed banks.* In their brief (p. 215) counsel for defendant called attention to the Act of the Nebraska Legislature, 1930, with the statement (p. 217) that this court will take judicial notice of the modification of the Guaranty Fund Law by the Nebraska legislature in March 1930. With that statement we agree. Section 1 of that Act provides:

> "DEPOSITORS FINAL SETTLEMENT FUND. For the purpose of providing a fair and just settlement of the claims of depositors and others heretofore authorized to be paid out of the Depositors' Guaranty Fund, there shall be created and established a fund to be known and designated as 'Depositors' Final Settlement Fund', which fund shall comprise and consist of the following:
>
> (c) All property, moneys, funds, proceeds, rights, credits, accounts and choses in action of every kind and nature constituting, derived from, arising out of, or in any manner connected with or pertaining to the assessments, regular and special, heretofore accrued and levied against any and all corporations transacting a banking business in this state, for the purpose of establishing, maintaining or reimbursing what was formerly designated as the Depositors' Guaranty Fund of the State of Nebraska, which assessments, more specifically, are the special *assessments* levied by the Department of Trade and Commerce on or about *December 15, 1928*, April 17, 1929, and January 2, 1930, and the regular assessments accrued and levied on or about July 1, 1929, and January 1, 1930.

"SECTION 2. DEPOSITORS' FINAL SETTLEMENT FUND-ASSESSMENTS. For the purpose of providing a fund for depositors in state banks closed prior to the time this Act goes into effect, every corporation engaged in the business of banking under the laws of this state shall be subject to assessment to be levied, collected and applied as in this act provided. On the first day of January of each year during the period of ten years beginning with the year 1931, and ending with the year 1940, inclusive, the Department of Trade and Commerce shall levy upon every state bank an assessment of two-tenths of one per cent of its average daily deposits during the year ending December 1st last preceding, as shown by the statements required to be made and filed with the Department. * * *

"SECTION 5. DEPOSITORS' FINAL SETTLEMENT FUND-CLAIMS. Only owners and holders of the following described claims and rights shall be entitled to receive payment from the Depositors' Final Settlement Fund and to participate in the benefits thereof, to-wit:

"1. Unpaid claims of depositors and of others entitled to priority, as by law provided, which shall have been heretofore or hereafter adjudicated against insolvent state banks of this state, including those banks which have heretofore closed and those which hereafter and prior to the time this Act goes into effect, shall have been closed by the Department of Trade and Commerce; Provided, such claims as have been heretofore certified to the Department as claims against the Depositors' Guaranty Fund, or shall have been heretofore certified to the Department as claims entitled to the benefits of the Depositors' Final Settlement Fund.

"SECTION 16. REPEAL. That said Sections 7995, 8008, 8028 and 8033 Compiled Statutes of Nebraska, 1922, as amended; Sections 22 and 23, of Chapter 191, Laws of 1923; Sections 8024, 8025, 8026,

8027, 8009 and 8035 Compiled Statutes of Nebraska, 1922, as heretofore existing are hereby repealed.

"SECTION 17. INDUCEMENT. The inducement for the passage of Section 16 of this Act, which repeals various sections of the statutes relating to the Bank Depositors' Guaranty Fund and assessments therefor, is the passage of Sections 1 to 5, inclusive, of this Act, and if any one or more of said Sections 1 to 5, inclusive, of this Act, shall for any reason be held unconstitutional or invalid in whole or in part, then and in that event said Section 16 of this Act shall be invalid and of no force or effect, and the sections of the statutes sought to be repealed by Section 16 shall be in full force and effect."

It will be observed that Section 8028, under which the tax involved herein was levied, has been repealed, and the tax involved herein, with the subsequent tax for the year 1929 and January 1, 1930, together with the regular assessments of July 1, 1929, and January 1, 1930, are to go into a Depositors' Final Settlement Fund to be distributed only to depositors in banks which have failed prior to March 1930, so that the only purpose of the emergency tax is to take assets from going banks to give to depositors in banks that have failed. The legislative Act of March 1930, did not change the status of the banks with respect to the payment, because under the law in force in Nebraska at the time, every penny of the tax levied against the banks or the Guaranty Fund was to go to depositors of banks that had failed, in the order of priority of adjudicated claims, and hence such payment was directly taking the property of the banks and the security of their depositors to give to depositors of failed banks.

The legislative Act of 1930, however, changed the rule of priority and attempts to distribute such assessments among all the depositors of banks which failed prior to the passage of the Act.

In *Ochoa v. Morales*, 57 Law Ed. 1437, Justice Pitney uses the following:

> "Whatever else may answer to the definition of the term 'Due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to the statutes, usages and modes of procedure, and without notice or opportunity for hearing."

In *Daugherty v. Thomas*, 140 N. W. 619, the court says:

> "The bills of rights in the American Constitution forbid that parties shall be deprived of property except by the law of the land, and if the prohibition had been omitted a legislative Act to pass one man's property over to another would nevertheless be void."

In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 or 67 Law Ed. 322, this court, through Justice Holmes, said:

> "The general rule at least is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking * * * It is not plain that a man's misfortunes or necessities would justify his shifting the damages to his neighbor's shoulders."

It can hardly be questioned, accordingly, that under present conditions the levy of the emergency tax against going banks to pay depositors in failed banks violates the Fourteenth Amendment.

ADVERTISING BY BANKS THROUGH SIGNS CONTAINING THE WORDS "DEPOSITORS IN THIS BANK ARE PROTECTED BY THE GUARANTY FUND OF THE STATE OF NEBRASKA", AND BY STAMPING ON CERTIFICATES OF DEPOSIT: "DEPOSITS IN THIS BANK PROTECTED BY GUARANTY FUND IF INTEREST IS NOT PAID IN EXCESS OF 4% PER ANNUM."

Page 33 of defendant's brief contains the following in italics:

> "The only legal requirement of the banks was to hang a certificate in their bank to the effect that they had complied with the provisions of the law."

Section 7995 of the Laws of 1922 as amended by Senate File 60, 1925 Session Laws, provides:

> "REPORT—TO OBTAIN GUARANTEE FUND CERTIFICATE. Every corporation hereafter organized for transacting a banking business under the laws of this state, shall file with the Department of Trade and Commerce a full, complete and detailed report of this article, and the Department upon examination of the report and approval of the same, if satisfied that such corporation has complied with the requirements of this article, shall issue to said banking corporation a certificate stating that said banking corporation has complied with the laws of this state for the protection of bank depositors, and that its depositors are protected by the Depositors' Guarantee Fund of the State of Nebraska. Every banking corporation receiving such certificate shall conspicuously display the same in its place of business and said banking corporation may print or engrave upon its stationery words to the effect that its depositors are protected by the Depositors' Guarantee Fund of the State of Nebraska. Provided, that after April 1, 1926, said banking corporation shall only print or engrave upon

its stationery or in any advertising refer to the Guarantee Fund in words as follows:

"'Depositors in this bank protected by Guaranty Fund if interest is not paid in excess of four per cent per annum'. The printing or engraving by any bank of a false statement advertising such guarantee is hereby declared to be a violation of the provisions of this Article."

In granting a charter to a State Bank, the State gave a certificate which contained the words: "Depositors in this bank are protected by the Guaranty Fund of the State of Nebraska", and the law compelled the banks, under penalty of forfeiture of their charter, to display that certificate in a conspicuous place. The purpose of the certificate is plain. The State desired depositors in state banks to be informed that in addition to the assets of the bank they had security in a Guaranty Fund held by the State of Nebraska. In displaying signs in the bank to the effect that their depositors were protected by the Guaranty Fund of the State of Nebraska, the banks were merely complying with the spirit of the law, and hence should not be subject to criticism, especially from state officials.

With respect to the stamp on certificates of deposit, the law specifically provided that after April 1, 1926, a state bank shall only print or engrave upon its stationery, or in any advertising refer to the Guaranty Fund in words as follows:

"Depositors in this bank protected by Guaranty Fund if interest is not paid in excess of four per cent per annum."

Hence in stamping certificates of deposit with the above words, the banks were merely complying with the mandatory provisions of the statute. It is absurd to claim that a bank is estopped from questioning the validity of the emergency tax under present conditions, because of displaying signs in the bank, to the effect that: "Depositors in this bank are protected by the Guaranty Fund of the State of Nebraska", when the statute required the Bank to give such notice to its depositors.

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ARTICLES IN THE OMAHA BEE-NEWS DURING THE SUMMER OF 1926.

Why the state banks should be criticised by the defendant for newspaper articles in the Omaha Bee-News is difficult to understand. The criticism should be reversed.

In 1926 the Banking Department of Nebraska was disturbed because of the collapse of the Guaranty Fund in South Dakota. A conference was held between Mr. Wilson, advertising director of the Omaha Bee-News, and the Banking Department in Lincoln. It was there deemed advisable to print a series of articles lauding the beneficent effects of the Guaranty Fund in Nebraska. The articles were prepared and submitted to the Banking Department and received their approval. Some fifteen bankers were then called in a conference at Fremont to consider such

advertising. Mr. Griggs, who at that time was the head of the Banking Department, and Mr. Wilson, were present. The bankers were there advised that the Department desired the publication of such articles. 353 of the 839 banks then in existence agreed to pay for the publication. The articles were accordingly published. The published articles were the joint work of Mr. Wilson and Mr. Ballard Dunn, of the Bee-News, and Mr. Van Peterson, Secretary of the Guaranty Fund Commission, and Kirk Griggs, Secretary of the Department of Trade and Commerce. Not a single banker contributed one line or suggestion towards the published articles, unless possibly Mr. Stephens, and the only part the bankers took in the matter was to pay for the same at the suggestion of the Department of Trade and Commerce.

With respect to the conference at Fremont, Mr. Stephens' testimony is as follows:

Q. Who submitted the advertising?

A. They were presented to us by the Editor of the Omaha Bee, Mr. Ballard Dunn, his assistant Mr. Leo Wilson, and they were accompanied by Mr. Griggs of the Banking Department.

• • • •

Q. Were the advertisements drawn at that time?

A. Yes, they were all drawn, and some of the art work was submitted also.

Q. Do you know whether the information contained in those advertisements was gone over by Kirk Griggs at that time?

A. Yes, it was gone over by him. He sat with us in conference, and each line and paragraph of the

advertisements was read, examined and approved.

Q. Had you ever seen any of that material before that day?

A. No, I had nothing to do with preparing it. (Record p. 517).

Q. Was anything said as to who furnished the material for the advertisements?

A. We were assured by Mr. Wilson that the advertising data was all being secured in Lincoln from the Banking Department and the office of the Guaranty Fund Commission. (Record p. 518).

Mr. Schantz' testimony is as follows:

Q. Your attention has been called to articles published in the Omaha Bee in 1926, you remember the newspaper articles?

A. Yes.

Q. State what part, if any, you took as to giving the information contained in those articles?

A. I gave none of the information.

Q. Did you have anything to do with the preparation of those articles?

A. No, sir.

Q. You knew of their publication?

A. Yes, but I was not very much in sympathy with the matter, in fact, I objected from the first.

Q. Were you informed as to who was to give the data for the publication of these articles before their publication?

A. Yes.

Q. Who?

A. The Secretary of the Department of Trade and Commerce, Mr. Kirk Griggs, and the Secretary of the Guaranty Fund Commission, Mr. Peterson. (Record pp. 594-595).

It is not claimed that the newspaper articles contained any false statement of facts. It is said they gave an assurance to the public that the Guaranty Fund would not fail. Are the state bankers to be held liable because some banker, or newspaper or state official, has expressed an opinion that the Guaranty Fund would never fail? If any one has a right to complain of the newspaper publications, it is the state bankers of Nebraska. Before the articles were published, the Department of Trade and Commerce gave out information to the effect that the Guaranty Fund was solvent and that the levy of emergency taxes would be practically over in one or two years at most.

Mr. Stephens testified that on April 22, 1925, at Fremont, Mr. Kirk Griggs, Secretary of Trade and Commerce, spoke before the bankers, and in that speech stated that the net loss would be approximately $3,000,000.00. (Record p. 515). And later on October 22, 1925, Mr. Griggs repeated that statement. (Record p. 516). This is confirmed by the report of the Secretary of the Guaranty Fund Commission as to the condition of the Guaranty Fund as of June 30, 1926, in which the deficit is stated as $2,715,999.12. (Record p. 129). As against this deficit there was a stockholders' liability in excess of $3,000,000.00. The close of the report of Secretary Peterson contains the following:

> "The average loss per bank closed is continually growing less, and we do not feel there will be a very large number of banks yet to be closed in which there will be a loss to the Guaranty Fund. (Record p. 130).

In reliance, accordingly, upon statements received from the officials of the Banking Department that the deficit in the Guaranty Fund in 1926 was less than $3,000,000.00, and this was partly covered by stockholders' liability, and there would be few further failures, the bankers paid the assessment for 1926 and 1927 and the first half of 1928. The banks of Nebraska had no means of knowing the real condition of the state banks and that the deficit in the Guaranty Fund would ultimately reach more than $20,000,000.00. They were assured by the Secretary of the Department of Trade and Commerce that the troubles of the Guaranty Fund were over. They relied upon the statements of the Secretary and paid into the Guaranty Fund enormous sums, whereas if the truth had been known that hundreds of banks would of necessity fail, the solvent banks of this state would have ceased to contribute to the Guaranty Fund. While depositors in failed banks may have been deceived through the false security of the Guaranty Fund, the banks have been the real sufferers, for they have contributed millions of dollars to pay the losses of failed banks during the period of deflation, when they needed every dollar of their assets to protect their own deposits, thereby weakening their capital investment to a degree that they can no longer contribute to this unjust tax and remain solvent. The claim that the banks are estopped and should be penalized because of advertisements appearing in newspapers and in pamphlets is utterly without merit, for if any one

is to blame for the newspaper articles, it is the Department of Trade and Commerce, who sponsored the publications and gave to them their approval.

UNDER PRESENT CONDITIONS THE TAX IS CONFISCATORY.

Criticism is made because the plaintiffs offered, as proof of the present condition of the banks, data taken from the published statements required by the law to be made. If all this evidence should be set aside the result would be the same. The trial court found, and the decree so states, that each of the special assessments provided for by Section 8028, under present conditions, is unjust, oppressive, unreasonable in amount, and confiscatory of the earnings and property of the plaintiff banks and of the banks in behalf of whom this suit is brought. No other finding would have been justified. From the evidence offered by defendant, such a conclusion follows.

Page 89 of defendant's brief referring to the dividends for 1927 and 1928, contains the following:

> "The banks actually paid dividends for the 18 months of $1,407,268.00, which was an average for all the banks of 7.45% on the capital of $18,875,500.00, and 5.62% on the total capital and surplus of $24,958,557.00.

FIGURED ON AN ANNUAL BASIS THE PERCENTAGE WOULD BE REDUCED ONE-THIRD.

This would leave the return to the banks on invested capital of only 3.75% per annum.

The statement of defendants, however, upon which the percentage is based, is not correct, as per Exhibit "10" shown in their brief. (p. 56). For the year 1927 the capital stock is $20,648,500.00, while the combined assets, capital stock, surplus and net undivided profits, is $29,053,971.06, and for the year 1927 the capital stock is $19,001,000.00, and the combined assets, capital stock, surplus and undivided profits is $27,976,756.00, so that the actual net earnings of all the banks for the year 1927 and the first half of 1928 did not exceed 3% upon invested capital. It can hardly be claimed under such conditions that the emergency tax is not confiscatory.

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THE EMERGENCY TAX IS NOT ONLY CONFISCATORY BUT DESTRUCTIVE OF THE BANKING SYSTEM.

The real financial condition of the banks is shown conclusively by facts that are not in dispute. In December 1928, the 726 state banks carried real estate, other than that used in business, to the amount of $9,872,647.21. (Defendant's brief p. 56). In addition the banks carried $4,000,000.00 of notes which had been ordered out by the Banking Department as worthless or of doubtful value. Under the testimony of Mr. Peterson, with an experience of ten years, such real estate had a realizable value of 43 percent. The above real estate was forced upon the banks in an attempt to save losses from insol-

vent dobetors. The capital stock of the banks was $19,-100,000.00 in 1928. The surplus and undivided profits amounted to $6,075,741.87, plus $2,900,014.22, or a total of $8,975,756.09. If the banks were compelled to cash in real estate as the law requires, and to clean the note cases of doubtful or worthless notes, it would practically wipe out their entire surplus and undivided profits, so that the tax involved herein with the increased assessments for years 1929 and 1930, which are set aside for Depositors' Final Settlement Fund, would seriously impair the capital of the banks, and as Mr. Bliss, Secretary of the Department, stated, force two-thirds of the banks into liquidation. The evidence, even with regard to the State Bank of Omaha, which is referred to as one of the prosperous banks and is concededly well managed, does not justify the tax involved herein. That bank was organized in 1912, the year after the Guaranty Fund tax began to function. There was paid in at the time $300,000.00 capital, $37,-500.00 surplus, and later there was added to the surplus $50,000.00 realized from the sale of a lease. No dividends were paid from 1912 to 1918. From 1922 to 1928 the bank paid 10% dividend on its capital stock, or 6 percent dividend on its capital and surplus. During its entire existence it has paid $294,000.00 dividends, and has paid into the Guaranty Fund $394,000.00, or $100,000.00 in excess of the dividends paid to its stockholders. Two-thirds of the banks of Nebraska paid no dividend whatever to the stockholders during 1927 and 1928, and a large number of the banks must show impaired capital if the Guaranty Fund assessment is to be enforced. It is idle to assert, under present conditions, that the emergency tax is not confiscatory.

ONE-HALF NEBRASKA STATE BANKS HAVE FAILED SINCE THE EMERGENCY TAX BECAME CONSTANT.

Exhibit "16" (Record p. 306) gives the number of state banks taken over by the Department of Trade and Commerce from 1920 to December 31, 1928, at 265. The emergency tax became constant from 1921 until it was repealed in 1930, so that 261 banks have failed out of a total of 1010 doing business in 1921. In addition, 242 banks have been compelled to make an assessment on capital stock in the sum of $2,106,682.15, so that 503 of the 1010 state banks have become insolvent since the emergency tax has become constant.

During the period from December, 1921, to December, 1928, there has been paid into the Guaranty Fund $13,-167,855.98. What stronger evidence could be offered that the emergency tax is confiscatory and destructive of the banking system? It has been urged that the deflation period or panic of 1920 and 1921 was the cause of so many bank failures. In part this is true, but it must be conceded that taking from the banks over $14,000,000.00 since 1920 to pay the losses of failed banks during a time when each bank needed all of its assets to protect its own depositors has been a contributing cause and a large one, to the failures.

It is urged that the Guaranty Fund has been a great benefit to the state banking system. Possibly it may have increased deposits in state banks to some extent, although this is doubtful. State banks were permitted to receive public moneys on deposit without a security bond while the Guaranty Fund was intact but such privilege was withdrawn as soon as the fund became insolvent. What-

ever benefit the banks may have received from a Guaranty Fund ceased when the condition of the Guaranty Fund as insolvent became known in the summer of 1928. It can hardly be claimed accordingly that the Guaranty Fund tax has been a benefit to the state banks in view of the fact that one-half of them failed under its operation and most of the remainder are in a precarious condition because of the large enforced contribution during the past eight years to pay the losses of failed banks. Certain it is that under present conditions the emergency tax is destructive of the banking system and harmful to the general welfare.

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INTERVENERS' CONTENTION

On page 48 of their brief, intervenors say:

"Many of the seven hundred thirty eight banks in the state are in a *most* unsatisfactory condition. A great quantity of worthless assets has been accumulated in the banks. These worthless assets will represent great losses to the banks and they originated during the period of inflation and speculation which accrued after the war."

Again, Brief page 46:

"Appellees respectfully submit if the court shall find that there is a contract between interveners and the banks and that interveners have accrued rights under this contract, although it may be decided by reason of present conditions that the Act has no substantial relation to the public welfare, nevertheless the accrued rights of interveners should be recognized under the record in this case and the enforcement of these rights made possible."

Again, Brief page 40:

> "These interveners as depositors in failed banks are parties to the prescribed contract and have a pecuniary interest in the payment of the assessments by the banks, and they have the right to demand that payment of these assessments be made to the Fund by the banks until all accrued liabilities are liquidated."

Again, referring to the Act of the legislature of Nebraska of March 1930, intervenors said:

> "These intervenors, as a matter of law, must be permitted to question the propriety and legality of the Settlement Fund should they so elect, in a proper proceeding instituted in a proper court."

The position of the intervenors is clear and their statements frank. They claim that the legislative act, providing for a Guaranty Fund, created a direct obligation between the banks and depositors in failed banks to pay their losses, so that neither court nor legislature can relieve the banks until the losses are fully paid, even though the result will be the wrecking of the entire state banking system of Nebraska.

Under present conditions the enforcement of the emergency tax will result in paying intervenors in full and depositors in failed banks who have been fortunate enough to obtain priority of adjudication of their claims. The deficit in the Guaranty Fund is so great that the interest alone cannot be paid, so that it is certain a part only of depositors in banks that have already failed will receive anything from such construction of the law. With respect to present depositors in banks, intervenors are frank enough to say they have no concern, and as the 738 banks are in a most unsatisfactory condition, having

a great quantity of worthless assets which will represent great losses, it follows that the present depositors in banks must suffer heavily if the tax is to be enforced.

What have the state bankers done to be penalized with the loss of all their investments, and what have present depositors in banks done that their security should be taken from them? 410 of the state banks had received their charters when the Guaranty Fund law was enacted, so that such banks were forced to do business under that law or lose their investment. The remaining banks took out their charters under the Guaranty Fund Act. By that law the state undertook the supervision and control of the state banking business under a department created for such purposes. The affairs of banks were to be thoroughly examined by examiners selected by the state as often as the department might require. The acts specified conditions under which loans could be made so as to safeguard the banks' investments. No bank was to be chartered until the department of banking should be satisfied that the parties requiring said charter were parties of integrity and responsibility and that the public necessity, convenience and advantage would be promoted by permitting such bank to engage in business. (Section 7997) No person was to be permitted to become an executive officer of a bank until he had obtained a license to so act and executive officers were required to be persons of good moral character, known integrity, business experience and responsibility and capable of conducting the affairs of the bank on sound banking principles, and whenever the department upon investigation should be satisfied that an active executive officer was conducting the bank's business in an unsafe or unauthorized manner

or endangering the interests of the stockholders or depositors, it was its duty to revoke the license of such executive. *No one can truthfully say that the present banks are in the slightest way to blame for the failure of the Depositors' Guaranty Fund for the entire responsibility and control of the state banks was taken over by the state.*

The Depositors' Guaranty Fund was declared to be: "For the purpose of providing a Guaranty Fund for the protection of depositors in banks." To each bank was issued a certificate with the seal of the state containing the words: "*Its* depositors are protected by the Depositors' Guaranty Fund of the State of Nebraska". Such were the inducements held out to those who desired to engage in the state banking system in the State of Nebraska.

Conceding for the purpose of argument only that the law imposed a contractual obligation upon the part of a bank to pay the assessments called for therein, the same statute which required the bank to pay such assessments promised a Guaranty Fund which would stand as a protection to its depositors and give stability to the banking business. The benefits promised were as much a part of the law as the obligation to pay the assessments. Should the Banks be compelled to continue contributions, when there is no longer any protection to *their* depositors in a Guaranty Fund? Is it not the law rather than when the enforced contributions no longer yield the promised benefits the right to exact them ceased? To hold that banks must continue to pay enforced contri-

butions which are confiscatory and destructive of their business when no benefit whatever inures to the paying banks or to the public, is to require an unjust thing. If there was a contract obligation on the part of the banks to pay the emergency tax, such obligation ended when the Guaranty Fund became insolvent and afforded no protection whatever to the paying banks' depositors. We submit, accordingly, that the legislative act did not create an obligation upon the part of the state banks to continue to pay the emergency tax *after* the Guaranty Fund was *insolvent*. It would be shocking to our sense of justice to require the banks to continue these large forced contributions to pay the losses of banks which have failed through no fault of the present banks, when the inevitable effect would be to wreck the banking system and cause untold losses to the present depositors in banks.

THE OPERATION OF THE LAW HAS NO TENDENCY TO ACCOMPLISH A PUBLIC PURPOSE.

Appellees, in their brief, insist upon assuming that the question before this court is one only of economic policy, and that the court will therefore not attempt to measure or weigh the merits or wisdom of the law. In taking that position they stop far short of the real question that is involved here.

When the law was originally enacted it is true that the question of its policy and proprietary and economic justification was then a question for the legislature. The law then necessarily had to be considered in the light of its contemplated operation and effect. What that would be was then a matter of conjecture. But after twenty

years' experience under the law, the question is not now an economic one or a question of policy. A definitely proven condition exists. The settled and undisputed facts allow of no leeway nor speculation but present a definite condition for the application of legal principles.

Appellees say (p. 195):

> "The Guarantee Fund Law has *heretofore* been finally determined by the United States Supreme Court to have a rational relation to the public good." And on page 158:
>
> "If the law has failed to accomplish its purpose, that may be a cogent reason for its repeal by the lawmakers, but it can have no weight with the court in construing it."

In these statements appellees lose sight of, and fail to apply, the well recognized rule, set forth at the top of page 79 of our original brief, that a police regulation, in order to be valid, must not only *have* a legitimate public purpose but in its *operation* it *must, in a plain, appreciable and approximate manner, tend towards the accomplishment of that purpose.*

Appellees are satisfied to stop with the statement that this court has once held, on the premise of the contemplated operation of the law, that the law then operated for a public purpose. They do not answer the question, but are willing to avoid it as to whether the law at this time, in its operation, tends in any way towards the accomplishment of its original purpose. As to that fact they would have to admit that it does not. They do not argue that point.

The condition is undisputed. The banks receive no reciprocal benefits from the payment of the assessments. The assessments now exacted do not tend to protect the depositors in going banks, but destroy their protection. The imposition of these assessments against the banks does not create public confidence nor lend stability to banking, but has the opposite effect. The public knew at the commencement of this suit that the claims of depositors against failed banks was some $26,000,000.00; that the deficit in the Guaranty Fund was some $16,000,000.00; that the assessments were insufficient to more than pay the interest on adjudicated claims; that whatever was collected by assessments would be taken away from the operating banks, without benefit to them, without giving protection to their depositors, and would be paid to the depositors in banks long since failed. Such a condition jeopardizes the present banks and creates loss of confidence in banking.

The assessments now imposed bear no relation to current losses. The funds derived through these assessments are not paid to the depositors in banks which are failing during the period covered by the assessment. By the law there is no provision tying up current losses with current assessment so that present depositors can have any expectancy of benefits through the assessments. The assessments go to pay the claims of depositors in banks which have long since failed, and the deficiency in the Guaranty Fund, even were the special assessments indefinitely continued, is such that proceeds from assessments can never catch up with the losses so that under

the operation of the law current assessments will be related to current losses.

The operation of the law, without dispute defeats its object. That this is true is not open to argument. It is a fact which must be conceded from the record. It is a fact which the appellees do not dispute, but the answer of the appellees is that the court should not consider it. Do we not have the right to have the court consider the fact, which indisputably exists, that the operation of the law bears no rational relation to the object originally sought to be attained, but, on the other hand, defeats that very object? If that fact is true, as we have asserted it, we submit that the law is no longer constitutional.

The Supreme Court of Nebraska has rendered a decision, referred to in our brief on page 79, *Weaver v. Koehn*, 231 N. W. 703, (Neb.), in which to our minds they have taken a position diametrically opposed to the conclusion reached by that court in this case of *Abie State Bank v. Weaver*.

In the case of *Weaver v. Koehn* the court had before it a statute of the Nebraska legislature appropriating against the general funds of the state an amount of $260,111.34 to pay the depositors in banks that had failed, the deposits having been made in the banks while being operated by the state department, the Guaranty Fund Commission. The ~~conclusion~~ was made in that case that the state Guaranty Fund Commission, under the Guaranty Law, having operated these banks and accepted these deposits during operation by the state, was morally ob-

ligated at least to pay the claims of these depositors. The Supreme Court in that case held, however, that a tax to meet such appropriation was not for a *public purpose* and that therefore the act making the appropriation was unconstitutional.

The lower court in that case had held that the act was offensive to the due process provision of the Constition and was not for a public purpose, and that the appropriation involved the taking of property of the public generally for the relief of private persons, without obligation on the part of the state, either legal or moral.

In the course of the opinion the Supreme Court of Nebraska said:

> "But the appropriation of money by the state, to reimburse depositors for losses sustained by them, in failed banks, clearly appears to be the taking of money belonging to one class to pay the claims of those of another class. And this is in violation of the due process provision of the Federal and State Constitutions. Clearly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution.
>
> In view of the facts as presented, it clearly appears to us that the losses of individual depositors in state banks cannot lawfully be made up nor paid from the appropriation of money that belongs to all of the people of the state. The deposits herein were merely business transactions between the bank and the depositor, and the public should not be made to pay for the losses that a depositor may have suffered in such transactions."

The court then quoted from Gray's Limitations of Taxing Power, 123, Section 170, as follows:

> "The state exists for the benefit of all; any devotion of its powers to merely private ends is such a perversion of its purposes and duties as to be utterly void; and it is the duty of the judicial agents of the state to protect the community from such perversion."

We submit that the operation of the Guaranty Law, as to the banks appealing in this case, is not in any particular different from the operation of the law under the statute so held to be unconstitutional and to be in violation of the due process clause of the Federal and State Constitutions.

In the operation of each of these laws there is now no public purpose served. The same rule to determine whether a public purpose exists would apply to each case. If the payment of the depositors in the banks that failed while operated by the state bore a rational relation to stabilized present banking, to the protection of present depositors, to the prevention of panics and runs on banks, then the law would have served a public purpose and necessarily would have been sustained; it would then have been sustained especially in view of the fact that the legislature may meet the moral obligations of the state. But the payment of these depositors served no public purpose and the law was declared unconstitutional, for, as the Supreme Court of Nebraska said, clearly this:

> "appears to be the taking of money belonging to one class to pay the claims of those of another class."

Just so does the Guaranty Law now take the money of the banks, and take away from the present depositors of those banks their protection, in order to pay the de-

positors in banks that have long since failed. It takes from one class and pays to another. It deprives one class of individuals of protection and benefits another class of individuals, and no public purpose is served thereby.

WE TAKE THE VIEW THAT BOTH REGULAR AS WELL AS SPECIAL ASSESSMENTS ARE ILLEGAL.

The appellees declare in their brief, in their heading on page three, that the appellants question only the special assessments and do not attack the other sections of the Guaranty Fund Law.

In that statement the appellees are mistaken. At the commencement of this suit the only assessments at that particular time sought to be collected were the special assessments. The suit was brought, enjoining collection of those assessments, they being the only ones whose collection was immediately threatened.

It is our view that this case tests the validity of the entire operation of the law, both as to regular and special assessments, since it tests the principle which determines not only whether excessive collections can be made but whether any collections whatsoever can be made against these banks, when such collections are no longer justified as having any rational relation to any public purpose. If the assessments admittedly defeat the object of the law, and no reciprocal benefits exist but injury to banking alone results, then the amount of the tax becomes immaterial, for no tax would then be justified and supported in its operation as tending towards the accomplishment of a public purpose.

DEPOSITORS IN FAILED BANKS HAVE NO CONTRACTUAL RIGHTS TO REQUIRE FURTHER ASSESSMENTS.

Appellees devote a large portion of their brief to the proposition that the obligation of the banks to pay these assessments is contractual, that the claimant depositors, with some $26,000,000.00 of claims, when they made their deposits impliedly entered into contracts with all of the state banks in the state, and, by virtue of the Bank Guaranty Law, all of the banks contracted they would see that these deposits were paid and that they would continue assessments indefinitely for that purpose.

The appellees and the interveners do not agree as to the extent or consequence of such a claimed contractual relation.

The appellees admit that even though the relation is contractual, and even though there were vested rights in these depositors, still the legislature may repeal the law and change and impair the obligation and terminate the agreements and vested rights at will, but they say the courts cannot, by declaring the law unconstitutional, reach the same end. Appellees in their brief say (p. 144):

> "These depositors have a vested contract right under the law against the banks of the state bank system. This contract is a valuable property right which cannot be taken or divested by judicial decree."

And yet, at the same time, the appellees say the legislature may divest these parties of their rights (brief,

p. 143), and cite the recent act of the Nebraska legislature modifying, limiting and changing the obligation of the banks with reference to assessments so as to provide a settlement fund and to pay a certain class of depositors a pro rata portion of their claims. Appellees insist that this law is valid, and yet this is inconsistent with the argument that the depositors had vested contractual rights, valuable property rights, protected by the Constitution.

Interveners, on the other hand, in an aim to be consistent, also claim that the rights of depositors are contractual, and that this is so regardless of whether the law has become unconstitutional in its operation; but they deny that these contractual rights can be impaired by any act of the legislature, and assert that the recent act of the Nebraska legislaure is itself unconstitutional as impairing vested rights of contract of the depositors whom they represent.

Interveners in their brief say (pp. 44, 45, 46):

> 'So appellees contend that the result of the present or future operation of the law (the Guaranty Law), in so far as it affects present or future depositors, should not be considered by the Court, nor should the Court in light of accrued rights of interveners, under all the facts shown in the evidence, consider the relation of the Act to present public welfare, as controlling. • • •
>
> The rights of interveners and depositors in failed banks which have accrued under the Act are paramount and superior to the right of the other parties to the prescribed contract to question the constitutionality of the Act. • • •

> * * * that interveners have accrued rights under this contract, although it may be decided by reason of present conditions that the Act has no substantial relation to the public welfare."

In other words, interveners claim, so far as their claimed rights are concerned, the question of whether the law now operates in such a way as to tend to carry out or support any public purpose, or whether the law in its present operative effect is unconstitutional, is immaterial, since they have contractual rights, arising while the law was in operation, and that these rights cannot be taken away.

They say it matters not what effect thees assessments have upon present banks; what the effect may be to the protection of present depositors; nor whether the operation of the law is justified for a public purpose. Their position is that though the assessments may be ruinous to the going banks, it is no concern of theirs, for they have claims for collection; that their claims are contractual and, regardless of public welfare, public interest, ability of the present banks to continue in business, they must be allowed to perpetuate this police regulation and collection of assessments and enforce the liability against the banks in spite of what the consequence may be.

The error of the appellees and of the interveners is no better exemplified than the admitted and diverse results to which their arguments lead them.

We submit that no one can have a vested right in the continuance of a police regulation, and we submit a

police regulation may govern transactions so long as it validly operates, but as soon as it becomes unconstitutional, its operation from that moment ceases.

In other words, these depositors entered into transactions by making their deposits, which transactions were then governed and controlled by a currently operating law. It was known to them at that time that the law could protect them and give them rights only so long as it continued; that it was a police regulation and subject to repeal by the legislature, and that if the law, in its operative effect, resulted in its becoming unconstitutional, that the regulation would then cease and could be so determined by decree of court.

Interveners in their brief (p. 73) say that the depositors "relied upon the supposed operation of the law." That is true, but they, together with all others concerned, were bound to take notice that the law might fail, be repealed, or, in its operation, become unconstitutional.

Appellees and interveners both rely upon the case of *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 59 L. ed. 316. That was a mandamus action, brought to compel the Oklahoma State Banking Board to recognize the claim of a depositor in a failed bank against the guaranty fund and, if the fund was insufficient, to compel assessments to meet the obligation.

The only question for determination in that case was whether the suit against the State Banking Board was a suit against the state; a question necessary to the de-

termination of jurisdiction. The Supreme Court held that the suit was against the state and not against the officers as individuals.

In the dissenting opinion filed reference is made to the character of the obligation in favor of the plaintiff depositor, but what the court has said in that dissenting opinion is no more than to say that the transaction and contract of the depositor in the bank, and the rights of the parties, were governed by the guaranty law, carried into the transaction by implication, since any contract made was with reference to that law, and the law, being then operative and unquestioned as to validity, was a part of the agreement by implication.

In that case the validity of the guaranty law was not questioned. It was at that time, in its beginning in 1914, in its operative effect, constitutional. That case is therefore entirely distinguishable from the case here. We do not question the proposition that a contract made with reference to the subject matter of a statute, so long as the statute is valid and consitutional, will by implication carry the provisions of the statute into it. But the provisions of the statute, so by implication carried into any agreement, do not survive the statute itself; they are not made an express provision so as to become of an independent contractual nature. The obligation is purely implied. Whenever the law becomes in its operation unconstitutional, the governing provisions of the statute cease. No one can get a vested right in the continuance of a police regulation. A complete answer to the argument that a contract is made which outlives the statute and continues, regardless of the statute, is the admission

on the part of the appellees that the obligation ceases when the statute is repealed, and so it must indubitably follow that the effectiveness of the implied provisions of the governing law also cease when the law is declared unconstitutional or when it becomes in fact unconstitutional.

In our case the assessments have not been paid. Their collection stands enjoined, and whether they must be paid depends upon whether the law was constitutional at the time of the commencement of this suit.

In 13 Corpus Juris, p. 561, it is said:

> "Where a provision of a statute is to be read into a contract, it falls with the statute when such statute is subsequently declared unconstitutional."

In the case of *City of Cleveland v. Clements Bros. Const. Co.*, 67 Oh. St. 197, 65 N. E. 885, a statute of the state of Ohio, required contractors with municipalities to insert in their contracts a provision limiting the hours of labor of their employees performing work under the contract. This law was held unconstitutional, as abridging the liberty of contract. A contractor with a municipality had expressly inserted in his contract the provisions required by the statute. It was argued that, having expressly inserted the provisions in his contract that the hours of labor would be limited, the contractor was estopped to set up the unconstitutionality of the law. It was urged that when the city:

> "invited bids for the performance of the work, 'The statute is one of the conditions which must be complied with, and an obligation which must be assumed by the contracting party.' The contracting party

(the Clements Bros. Construction Co.) was not compelled to bid. It did so voluntarily, with full knowledge, and, when awarded the contract, executed it voluntarily, knowing all of its provisions, and assumed the obligations and conditions imposed by the statute."

The court held that these provisions expressly inserted in the contract did not take upon themselves the character of contractual obligations, but were to be considered as a reference only to the law governing such matters, and that such provisions were valid only so long as the statute itself was valid. In the opinion the court said:

"If the law is valid, it governs the contract and the rights of the parties, whether actually incorporated into writing or not, since all contracts are assumed to be made with a view to existing laws on the subject. * * It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates. * * * Courts in such cases are not bound by mere forms, but must look at the substance of things, and, so viewing this transaction, it would be idle to attempt to deceive ourselves with the idea that the question involved in this appeal arises out of the stipulations of the parties to the contract, or is governed by them, rather than the provisions of a statute. The contract is in the form that we find it not because the parties so elected to contract, but for the reason that the statute would not permit them to contract in any other way."

In a similar case, *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, the court held:

"A stipulation in a contract that it should be void on failure to comply with the labor law, which requires contractors on public work to pay the prevailing rate of wages, falls with the statute when the

> latter is declared unconstitutional, and hence will not estop the contractor from recovering on the contract, though the provisions of the statute were not complied with."

See, also, the decision in *Morse v. Metropolitan S. S. Co.*, 88 N. J. Eq. 325, 102 Atl. 524, where the court said:

> "As the provision of Corporation Act 1896, Sec. 65, as amended by Act April 1, 1912, authorizing the appointment of a receiver, without notice, is unconstitutional, a corporation may assert the invalidity, though it was incorporated under the act; the presumption being that parties, whether natural or artificial, have entered into a contract with reference to the valid laws only."

Where a contract is made with reference to the subject matter of a statute, the provisions of the statute do not become express contractual obligations of the parties, independent of the statute, but exist only by reason of the implication that the statute is intended to govern, and the statute, in the contemplation of the parties, could be intended to govern only so long as the statute is valid or unrepealed. The moment the statute becomes unconstitutional, its governing provisions cease to operate. There is nothing in the implication of the inclusion of the provisions of a statute in a contract which causes those provisions, as contractual obligations, to outlive the statute itself.

The statute here placed an imposition upon the banks to pay assessments so long as the statute remained constitutional. When it is conceded that the statute becomes unconstitutional, then it must be that the operative force

of the statute terminates. Such is the nceessary contemplation of the parties when they make their agreement. If the rule were as the appellees and interveners contend, that the banks have by contractual obligation become liable to the payment of all depositors in failed banks, so as to be perpetually obligated to pay assessments until all such depositors were paid, then a police regulation once enacted, although becoming unconstitutional in its operation, is perpetual and one against which there is no remedy nor relief.

The depositors who are claimants in this case have had the benefit of all the current assessments during the operative period of the law. Some $16,000,000.00 have been paid by the banks towards the satisfaction of their claims. Current depositors in going banks are also entitled to protection. They are entitled to have reserves built up for them. They are entitled to have banking made safe for them.

Interveners argue that nevertheless assessments must continue, regardless of the rights of present depositors, regardless of the public welfare, regardless of the safety of banking, on the theory that there are contractual obligations which outlast the law.

Appellees, although they argue contractual obligation, admit that these may be dispensed with by legislative act. Their admission directly coincides with out contention, and that is that the governing effect of the law, so far as it by implication is carried into contracts, continues only so long as the law exists and only so long as it continues as a valid regulation.

That the obligation of the banks to depositors is not contractual, in the sense that it outlives the statute, or in the sense that it creates vested rights of contract which cannot be impaired nor changed nor repealed by the legislature, is borne out by the decisions cited in our original brief of *Wirtz v. Nestos*, 51 N. D. 603, 200 N. W. 524, and *Standard Oil Co. v. Engel*, 55 N. D. 163, 212 N. W. 822, and these decisions are in no way, as we view them, inconsistent with anything that has been said in the case of *Lankford v. Platte Iron Works Co.*, 235 U. S. 461.

In *Wirtz v. Nestos*, 200 N. W. 524 (N.D.), an action was brought by depositors in certain banks, in behalf of themselves and all other depositors similarly situated, to compel the guaranty fund commission to allow their claims and pay their deposits in full. There was in the fund at that time $400,000.00, and the claims allowed against the fund amounted to $200,000.00. But this $200,000.00 was sufficient to pay only about 20 per cent of the total depositors in failed banks.

The legislature amended and changed the law so as to provide that the fund should be paid pro rata to depositors in all failed banks instead of, as provided in the original statute, to those depositors in the order of priority according to the time when their bank had failed.

The depositors who brought the suit claimed that this interfered with their vested rights in the fund, and that the statute changing those rights was unconstitutional as impairing a contractual obligation.

The court in the opinion said:

"Whether the law be passed in the express interest of a designated portion of the general public,

> or of the public as a whole, the act must be classed as a regulatory measure and find its justification in the police power.
>
> * * * but the broad basis upon which the exercise of the power rests is the safety and welfare of the state and of its citizens as a whole, rather than the interest of the individuals who make deposits in banks."

The court said that the rights of the depositors against the fund did not:

> "rest upon contract in any respect, and the legislative wisdom which dictated the adoption of that policy may likewise alter or abandon it."

And that:

> "The state undertakes to perform a service to depositors not in any manner founded on contract."

The court further said:

> "We think that the general statement of the rule in 2 Story, Const. (5th Ed.) 674, applies to the situation in the record:
>
> 'A party has no vested right in a rule of law which would give him an inequitable advantage over another; and such rule may, therefore, be repealed and the advantage thereby taken away."

The court in that opinion held that the depositors had no claim of a contractual nature and that the legislation changing their right from a priority right to one requiring them to share pro rata with all other depositors in the state was a proper and valid regulation.

The court in that opinion questioned the right of the legislature to impose burdens upon open banks that would

lead to general insolvency and collapse of the state banking system, but the facts showing such a condition *were not presented in the case*. The court said:

> "The situation, contrary to that which was before the Legislature in 1917, clearly disclosed that it would be possible to pay immediately or within a reasonable time, from assessments levied against the remaining banks, only a comparatively small number of the depositors in the banks then closed, without imposing burdens on open banks that would lead to general insolvency and collapse of the state banking system. Whether the power exists to impose such a burden, we need not decide."

In the case of *Standard Oil Company v. Engel, et al.*, 212 N. W. 822 (N. D.), the Standard Oil Company, which had moneys in certain banks and which banks had failed, brought an action against the guaranty fund commission to compel the commission to recognize its deposits as being covered by the guaranty fund. It proved that its deposits had been included in the reports of the banks and that the assessments had been based upon the deposits which it had, and it claimed that the guaranty fund commission, in refusing to recognize the deposits as valid claims, acted fraudulently and capriciously, and claimed that its rights in the guaranty fund were vested and contractual and that it was deprived of these property rights without due process of law.

The court pointed out, however, that it had no vested rights and:

> "that the rights of depositors as claimants against the fund *are not contractual*."

As a further argument the plaintiffs claimed that as depositors in the bank they had helped accumulate the fund and therefore had, for that reason, vested interests in it. The court answered that argument in the negative, as follows:

> "In this connection the plaintiff insists, on the one hand, that the depositors have built up the guaranty fund by contributions of their own property, and so it belongs of right to them. This, however, is not the case. The fund was created and is maintained by the state in the exercise of the police power through exactions from the banks analagous to special assessments. It may be true that the theory is that the banks will be benefited and recompensed through greater deposits on account of greater safety to the depositors, but, even so, the exactions going to make up the fund are paid by the banks and not by the depositors. While the act provides that the guaranty fund commission shall fix the rate of interest (not in any case exceeding 6 per cent) that may be paid upon deposits, this, likewise, is done in the exercise of the police power and will not sustain plaintiff's contention that it results in placing the burden of the exactions upon the depositors."

As we have said above, these decisions are not in conflict with *Lankford v. Platte Iron Works Co.*, but emphasize what clearly seems to us to be the rule that the Guaranty Fund Law is only a police regulation governing the relations of depositors and banks so long as it continues as a valid law, but that independent and contractual rights, except those running with the existing statute, cannot be created which would outlast the law itself, and that the police regulation is at all times not only subject to modification by the legislature but, when in its operation it becomes unconstitutional, is subject to being

held so by the courts, and that from the time it becomes unconstitutional it no longer, by implication, can govern the existing rights of the parties involved in any past transaction under it, but ceases from that moment in its further operation, and all rights which would otherwise currently accrue under it are from that time gone and extinguished.

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EVERY STATE BANK IS SO INVOLVED AND INTERESTED AS TO HAVE THE RIGHT TO RAISE THE QUESTION OF UNCONSTITUTIONALITY.

The appellees, on page 198 of their brief, urge that no party is entitled to equitable relief against the enforcement of a law by showing that it works a hardship on others, and they say that some of the banks have been able to profitably operate and yet pay these assessments, and that they have no right to point out that the law is oppressive and confiscatory as to others.

The cases which they cite are statutes regulating independent corporations, having no enforced partnership between them. It is apparent that quite a different rule obtains under those circumstances. A corporation, acting independently of others, which makes a profit and is not oppressed, and to whom a tax is not confiscatory, cannot urge that the tax is confiscatory as to others, for as to those others it is not concerned. It has no interest in them. It is not hurt.

But here we have, to the extent of the Guaranty Fund law, an enforced partnership between all of the

state banks in the state. Where a bank fails, losses are magnified. Its good will is destroyed. As has been testified in this case, the closing of a solvent bank sufficiently depreciates the value of its assets to wipe out its entire capital. Each bank in the system, therefore, is concerned in the life and success of every other bank. It is concerned in seeing that other banks are not oppressed, that their properties are not confiscated, that they are allowed to live and continue in business, for their failure and consequent losses creates an immediate burden upon the successful bank. Each bank therefore in the state, whether it can operate profitably or not, is interested in the success of every other bank, and therefore has the right to show the operative effort of the law upon the entire state banking system, for the losses of the failing banks must be paid by the others.

If the law, then, is injurious to a great majority of the banks, as we contend, if it prevents them from accumulating reserves for their own depositors, if it hampers them in their banking business, if it destroys confidence in the people because of the immense obligation against them, if it is necessary that they make up the deficit in the Guaranty Fund, it certainly must follow that any bank in the system has the right to raise the question and test the constitutionality of the law.

But this case is brought by the Abie State Bank in behalf of all of the banks in the state, a great majority of whom, even under appellees' own rule, if applicable to the case, have a right to raise the question.

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IN CONCLUSION

It is claimed that this suit is controlled by Shallenberger vs. The State Bank of Holstein as res judicata. If the parties to this litigation were the same as the parties in Shallenberger vs. Holstein, and they are not, the judgment of this court in that case is not res judicata for none of the questions herein were presented to the court in that case or could have been presented. This court held in that case that the state had the right to try out the Guaranty Fund tax as a police regulation and to that end an inconsiderable part of a bank's property might be taken to create a Guaranty Fund to strengthen banks and protect their depositors and to stabilize banking. This case is now presented under changed conditions and with known results. The emergency tax as confiscatory was not before this court in the Shallenberger case and could not have been as it was not certain that any emergency tax would ever be levied. A deficit in the Guaranty Fund of over $15,000,000.00 was not before the court in that case and could not have been. The taxes to be levied in the future under the Shallenberger case were to go towards the creation of a Guaranty Fund to protect depositors in banks. In the present case the taxes sought to be enforced do not go into a Guaranty Fund at all to protect depositors in banks but are to go solely to pay depositors in banks that have failed. Instead of an insignificant taking of part of a bank's property for an ulterior public purpose, which was the basis of the decision in the Shallenberger case, today the state is demanding enormous sums not for a public purpose or to protect depositors in banks but for the private purpose to pay the losses of failed banks. There is no longer any

public purpose to be served by these enforced contributions from the banks, but on the contrary the end sought to be accomplished is a private one. No reasonable ground today can be urged why this tax should be continued. It is simply an attempt upon the part of the state to force enormous contributions from the banks to pay the losses of failed banks and hence is in direct violation of the Fourteenth Amendment. While of course everyone sympathizes with depositors who have lost their money through misplaced confidence in banks, the present banks are in no way to blame for their condition. To continue the tax would add very little to the relief of those who have already lost in part their deposits and would add thousands to their number through the wrecking of probably two-thirds of the present banks.

Respectfully submitted,

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